

105 FERC ¶ 61,390
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suede G. Kelly.

Magellan Pipeline Company, LLC

Docket No. IS04-75-000

ORDER ACCEPTING AND SUSPENDING TARIFF,
SUBJECT TO REFUND AND CONDITIONS, AND ESTABLISHING
SETTLEMENT PROCEDURES AND HEARING

(Issued December 30, 2003)

1. On November 26, 2003, Magellan Pipe Line Company, LLC (Magellan) filed FERC Tariff No. 15. As detailed below, we accept and suspend the tariff, to become effective January 1, 2004, as proposed, subject to refund and conditions, and set this matter for hearing. The hearing will be held in abeyance pending the outcome of settlement procedures in this matter. This order benefits customers by insuring just and reasonable rates and terms and conditions of service.

Background

2. On November 26, 2003, Magellan filed Tariff No. 15 (canceling FERC Tariff No. 2), which sets forth the rules and regulations governing the transportation and handling of petroleum products. Tariff Item No. 167 establishes a handling fee of six cents per barrel for small refiner gasoline, which one non-affiliated shipper agreed to pay. The concurrence of this shipper permits Magellan to establish this handling fee, in accordance with 18 CFR § 342.2(b). In addition, proposed Item No. 40 contains a revision to the testing and measuring requirements for liquid petroleum products.

Protests

3. On December 11, 2003, Frontier Refining and Marketing Inc. (Frontier) filed a timely motion to intervene and protest to Magellan's six cent per barrel handling fee in Item No. 167. Frontier is a shipper on Magellan and asserts that Magellan directed the handling fee to small refiners who produce small refiner gasoline. Frontier asserts that Magellan failed to produce any data or cost-of-service justification supporting the

proposed rate. Frontier argues that the handling fee is based on an arbitrary distinction between certain classes of customers and types of gasoline that cannot be justified by any differential costs in transportation or otherwise.

4. Frontier also asserts that Tariff Item No. 40 does not define the amount of sulfur necessary to trigger the handling charge, or any justification why sulfur content is an issue or impacts the cost of service. Frontier also claims that the impact of these tariff provisions by adoption by reference to participating carriers may prompt a refusal by carriers to accept Frontier's gasoline, and that these provisions are therefore arbitrary and discriminatory.

5. Frontier states that Item No. 25 of the Tariff allows Magellan from time to time to set specifications for petroleum products it will accept. Frontier claims this provision makes the Tariff unreasonably ambiguous. Frontier asserts that failure to publish the specifications in the Tariff violates the Interstate Commerce Act by failing to include a publication containing all of the rules for transportation of petroleum products.

6. Frontier states that the small refiner fee is contrary to Federal policy, as the Environmental Protection Agency (EPA) has granted small refiners greater flexibility for reducing sulfur due to economic hardship faced by these small refiners.¹ Frontier claims that the small refiners contribute a relatively small percentage of gasoline to the distribution system that is mixed with substantial amounts of other gasoline prior to sale and therefore would not have a detrimental impact on sulfur levels of gasoline used by motor vehicles.

Magellan's Answer

7. On December 17, 2003, Magellan filed a motion for leave to file one day late and a response to the protest of Frontier. Magellan asserts the Commission should allow it to file a response because these refiners are not similarly situated because Magellan incurs additional costs to handle and transport such gasoline. Magellan asserts that the EPA regulations which allow Frontier and the other small refiners to produce higher sulfur content fuels impose further testing and labeling requirements on Magellan, which justify the six cent per barrel charge. Magellan states that it serves six of the twelve small refiners which have the EPA sulfur content waiver status and it is therefore in a unique situation. Therefore, Magellan argues that these refiners are in a different class and the

¹ EPA regulations permit this particular type of gasoline to exceed the carrier's sulfur specifications.

imposition of a handling fee is not unduly discriminatory. Additionally, Magellan claims the cost of service provided in its response fully justifies the six cent per barrel charge.

8. Magellan asserts that the Commission should reject Frontier's claim that it should publish the sulfur standards in the tariff because it provided that information to the refiners at a meeting in September 2003. Further, Magellan claims that each and every term of the service need not be published in the tariff as long as they are readily available to the shippers. Magellan further asserts that the existence of small refiner gasoline, permitted by the EPA waiver, does not prohibit Magellan from seeking to recover the cost of transporting this gasoline for this group of shippers.

Procedural Matters

9. On December 11, 2003, Frontier filed a motion to intervene. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, any timely motions to intervene are granted unless an answer in opposition is filed within 15 days of the date such motion is filed. No answer was filed to Frontier's motion, and accordingly, the motion to intervene is granted. Pursuant to 18 CFR Section 343.3, a response to a protest may be filed no later than five days after the filing of a protest. Magellan requested a one-day extension of the time for filing its response. Magellan has shown good cause for its late-filed response and its response will be accepted to aid the Commission in addressing these matters.

Discussion

10. The issues in this case pertain to the data and methods used to determine Magellan's cost of service attributable to the proposed handling charge for small refiners with EPA sulfur content waivers. 18 CFR Section 342.2(b) of the Regulations requires a cost of service where the initial rate is protested. Accordingly, Magellan must file a cost of service consistent with 18 CFR Section 346 of the Regulations. The resolution of these factual disputes will affect the cost impact on Frontier and individual shippers on Magellan. At present, however, there is insufficient information to enable the Commission to resolve these disputes. It is therefore appropriate to establish hearing procedures to examine the issues raised in the protest.

11. Second, Magellan's proposed Item No. 40 states that it will accept petroleum products only when they meet the carrier's required specifications. The Commission agrees with Frontier that Magellan must include the product specifications in the tariff on file with the Commission or include the specifications by reference to a publicly available document provided to all shippers.

12. The Commission previously ruled that the filing of a proration policy in a carrier's tariff with the Commission or in a separate document served on all shippers, which was specifically referenced in the tariff, constitutes adequate notice to the shippers and fulfills the notice and filing requirements.² Accordingly, we direct Magellan to revise Item No. 40 to comply with our discussion and decision herein.

13. The Commission has, however, consistently encouraged parties to resolve disputes of this nature through settlement, and believes that formal settlement procedures may lead to a resolution of this case. The issues in this case involving Magellan's rate proposal should be resolved by settlement. Therefore, we shall hold the hearing in abeyance pending the outcome of formal settlement procedures in this matter. To aid the parties in their settlement efforts, a settlement judge shall be appointed pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.³ If the parties desire, they may, by mutual agreement, request a specific judge; otherwise, the Chief Judge will select a judge for this purpose.⁴ If a settlement cannot be reached, the instant docket will be set for hearing.

Suspension

14. Based upon a review of the filing, the Commission finds that Item Nos. 40 and 167 in FERC Tariff No. 15 have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, the Commission will accept and suspend those portions of FERC Tariff No. 15, to become effective January 1, 2004, subject to refund and subject to the conditions set forth in the body of this order and in the ordering paragraphs below.

² See *Total Petroleum, Inc. v. Citgo Products Pipeline*, 76 FERC ¶ 61,164 (1996); *Amoco Pipeline Company*, 82 FERC ¶ 61,108 (1998).

³ 18 C.F.R. ' 385.603 (2002).

⁴ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of the Commission's judges and a summary of their background and experience at www.ferc.gov/legal/oalj/bio/judges.htm.

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The Commission orders:

(A) Magellan's FERC Tariff No. 15 is accepted for filing and suspended, to become effective January 1, 2004, subject to refund and subject to further order of the Commission.

(B) Pursuant to the authority of the Interstate Commerce Act, particularly Section 15(7) thereof, and the Commission's regulations, a hearing is established to address the issues raised by Magellan's filing.

(C) Pursuant to Section 375.304 of the Commission's regulations, 18 C.F.R. ' 375.304 (2003), the Chief Administrative Law Judge shall designate a presiding administrative law judge for the purpose of conducting a hearing. The ALJ is authorized to conduct further proceedings pursuant to this order and to the Commission's Rules of Practice and Procedure.

(D) The hearing established in Ordering Paragraph (B) is hereby held in abeyance pending the outcome of the settlement proceedings described in the body of this order.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. ' 385.603 (2003), the Chief Administrative Law Judge is directed to appoint a settlement judge in this proceeding within 15 days of the date of this order. To the extent consistent with this order, the designated settlement judge shall have all the powers and duties enumerated in Rule 603 and shall convene an initial settlement conference as soon as practicable.

(F) Within 30 days of the date this order issues, the settlement judge shall file a report with the Chief Judge and the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 30 days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

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(G) Within 20 days of the date this order issues, Magellan shall make a compliance filing consistent with the decision regarding the adequacy of Item No. 40 and a cost of service in accordance with Section 346 of the Regulations, as described in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.